Jos ak Alam v Zulimi bin Lifat & Anor and another appeal

HIGH COURT (MIRI) — CIVIL APPEAL NOS MYY-12B-2/6 OF 2012 AND MYY-12B-3/6 OF 2012
STEPHEN CHUNG J
5 MARCH 2013

Damages (Personal Injury or Death) — Assessment — Loss of future earnings — Motor vehicle accident — Presumption of good health — Proof of receipt of earnings by own labour — Deduction of living expenses — Loss not to be speculative — Whether damages can be awarded where loss of future earnings cannot be proven — Civil Law Act 1956 s 28A(2)(c)(i),(iii)

Damages (Personal Injury or Death) — Personal injuries — Pain and suffering — Motor vehicle accident — Completed left bronchial plexus injury

Tort — Negligence — Road accident — Apportionment of liability — Contributory negligence — Collision between motorcar and motorcycle involving pillion rider — Pillion rider — Entitlement to damages — Innocent passenger — Pillion rider entitled to damages on a 100% basis notwithstanding contributory negligence of motorcycle rider — Sessions court apportioned liability at 70:30 — Appeal against apportionment

The first plaintiff was driving a motorcycle with the secondplaintiff as the pillion rider. The defendant was driving his car along in the opposite direction. At a junction, the defendant had swerved to his right in the path of the plaintiffs' motorcycle to enter the junction, causing the car to collide with the motorcycle. The plaintiffs were seriously injured in the collision and the second plaintiff subsequently died from his injuries. After trial, the sessions court judge adjudged that the defendant was 70% liable to the first plaintiff and 100% liable to the second plaintiff. He also adjudged that the first plaintiff was 30% liable to the second plaintiff. It was further adjudged that the defendant was to pay the first plaintiff 70% of the total judgment sum granted to the first plaintiff and to pay the second plaintiff 70% of the total judgment sum granted to the second plaintiff. The plaintiffs appealed against the whole decision whilst the defendant appealed against quantum.

Held, allowing the appeal and cross-appeal in part:

(1) The first plaintiff had right of way. The evidence established that the first plaintiff could not avoid the collision when the defendant swerved to his

right across the road, in the path of the motorcycle driven by the first plaintiff, to enter the junction. The trial judge had misdirected himself on the facts (see para 13).

(2) The trial judge had erred in adjudging that the first plaintiff was 30% liable to the second plaintiff. A pillion rider is entitled to recover the total amount of damages against a tortfeasor and it is within his prerogative to recover the damages against any one of the tortfeasors. The pillion is entitled to the total amount of damages notwithstanding the finding that the rider of the motorcycle and the driver of the car are equally blameworthy. In this case, the second plaintiff was an 'innocent passenger' and was entitled to damages on a 100% basis. He could not, as a pillion rider, be held to be vicariously liable for the contributory negligence of the first plaintiff (see para 15).

(3) Loss of future earnings and loss of earning capacity fall under general damages and not as special damages. Pursuant to s 28A(2)(c)(i) of the Civil Law Act 1956 (CLA) the plaintiff could not raise any presumption that he was in good health at the material time but for the injury. He must tender evidence to show his overall health but for the injury and that he was receiving earnings by his own labour before he was injured. There must be evidence to show that but for the injury he was not able to earn in the future. The trial judge did not refer to s 28(2)(c)(iii) of the CLA when he assessed the loss of future earnings and he had erred (see paras 19 & 24).

[Bahasa Malaysia summary

Plaintif pertama sedang menunggang motorsikal dengan plaintif kedua sebagai pembonceng. Defendan sedang memandu keretanya dalam arah bertentangan. Di satu simpang, defendan telah membelok ke kanan ke dalam laluan motorsikal plaintif untuk memasuki simpang itu, dan menyebabkan kereta itu berlanggar dengan motorsikal itu. Plaintif-plaintif telah mengalami kecederaan teruk dalam perlanggaran itu dan plaintif kedua telah meninggal dunia akibat daripada kecederaannya. Selepas perbicaraan, hakim mahkamah sesyen memutuskan bahawa defendan adalah bertanggungjawab sebanyak 70% terhadap plaintif pertama dan bertanggungjawab 100% terhadap plaintif kedua. Beliau juga memutuskan bahawa plaintif pertama adalah bertanggungjawab sebanyak 30% terhadap plaintif kedua. Selanjutnya adalah diputuskan bahawa defendan hendaklah membayar kepada plaintif sebanyak 70% daripada keseluruhan jumlah penghakiman yang diberikan kepada plaintif kedua. Plaintif-plaintif telah merayu terhadap keseluruhan keputusan itu manakala defendan telah merayu terhadap kuantum.

Diputuskan, membenarkan rayuan dan sebahagian daripada rayuan balas:

(1) Plaintif pertama berada di laluan yang betul. Keterangan membuktikan

bahawa plaintif pertama tidak dapat mengelakkan perlanggaran apabila defendan membelok ke kanannya melintang jalan, memasuki laluan motorsikal yang ditunggang oleh plaintif pertama, untuk memasuki simpang itu. Hakim perbicaraan telah salah arah berhubung fakta tersebut (lihat perenggan 13).

(2) Hakim perbicaraan terkhilaf dalam memutuskan bahawa plaintif pertama adalah bertanggungjawab sebanyak 30% terhadap plaintif kedua. Seorang pembonceng adalah berhak untuk mendapat balik keseluruhan jumlah ganti rugi terhadap pelaku salah tort dan ia dalah dalam prerogatifnya un tuk mendapat balik ganti rugi terhadap mana-mana daripada pelaku salah tort itu. Pembonceng itu berhak terhadap keseluruhan jumlah ganti rugi itu meskipun dapatan bahawa penunggang motorsikal dan pemandu kereta itu sama-sama patut dipersalahkan. Dalam kes ini, plaintif kedua adalah 'innocent passenger' dan berhak mendapat ganti rugi 100%. Dia tidak boleh, sebagai pembonceng, untuk dia bertanggungjawab secara vikarius kerana kecuaian penyumbang terhadap plaintif pertama (lihat perenggan 15).

(3) Hakim perbicaraan tidak merujuk kepada s 28(2)(c)(iii) Akta Undang-Undang Sivil apabila beliau menaksir kehilangan pendapatan masa hadapan dan beliau terkhilaf. Kehilangan pendapatan masa hadapan dan kehilangan keupayaan mencari nafkah terangkum di bawah ganti rugi am dan bukan ganti rugi khas. Menurut s 28A(2)(c)(i) Akta Undang-Undang Sivil 1956 plaintif tidak boleh membangkitkan apa-apa andaian bahawa dia berada dalam keadaan sihat pada masa matan jika bukan kerana kecederaan itu. Dia perlu mengemukakan keterangan untuk menunjukkan keseluruhan kesihatannya jika bukan kerana kecederaan itu dan bahawa dia menerima pendapatan daripada tenaganya sendiri sebelum dia cedera. Terdapat keterangan yang menunjukkan bahawa disebabkan kecederaan itu dia tidak berupaya mencari nafkah masa hadapan (lihat perenggan 19 & 24).]

Notes

For a case on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 412.

For cases on pain and suffering, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 907–914.

For cases on road accident, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1601–1900.

Cases referred to

KP Taxi Service Ltd & Anor v Zaharah & Ors [1969] 1 MLJ 49, FC (folld)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)

Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais [2005] 2 MLJ 318; [2005] 1 CLJ 695, CA (refd)

Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30; [1984] 1 CLJ Rep 294, FC (refd)
Ong Kim Hai v Kusaini bin Surip [1984] 2 MLJ 285; [1984] 2 CLJ 281, FC (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608; [2008] 3 CLJ 489, CA (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 CLJ 429, SC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(i), (2)(c)(iii)

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Stephen Chung J:

RULING

[1] In these two appeals heard together, I will refer to the appellant(s) and respondent(s) in each appeal respectively as the first and second plaintiffs and the defendant as per the parties in the Sessions Court Summons No MR-53–27 of 2011.

[2] In the first appeal MYY-12B-2/6 of 2012, the defendant appealed against such part of the decision of the sessions court judge on the quantum of damages, interest and costs only. In the second appeal MYY-12B-3/6 of 2012, the first and second plaintiffs appealed against the whole decision of the sessions court judge.

[3] In an appeal, the finding of a trial judge on which of two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate court on receiving the evidence forms the opinion that the judge was clearly wrong: *Ong Kim Hai v Kusaini bin Surip* [1984] 2 MLJ 285; [1984] 2 CLJ 281.

[4] It is axiomatic that a finding of negligence though involving matters of inference, is properly regarded as a finding of fact. For an appellant to succeed

in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However, much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely different views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge. An appellate court is not bound by inferences of fact drawn by the trial judge which did not turn on the credibility of witnesses, seen and heard by him, that it may not examine the matter afresh: *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71.

[5] The facts were as follows. On 1 July 2010 at about 7.45pm, the first plaintiff was driving a motorcycle along Jalan Tudan, travelling from Emart Supermarket in the direction of Shell petrol station at Tudan, Miri. The second plaintiff was the pillion rider on the motorcycle. On the same date, at about the same place and time, the defendant was driving his car along Jalan Tudan in the opposite direction. At about the junction of Simpang Permyjaya, the defendant swerved to his right across the road, in the path of the motorcycle driven by the first plaintiff, to enter the said junction to cause the car to collide with the motorcycle driven by the first plaintiff. The first and second plaintiffs were seriously injured in the collision. The second plaintiff subsequently died from his injuries.

[6] The first and second plaintiffs sued the defendant for damages arising from the collision. After the trial, the sessions court judge delivered his judgment on 18 May 2012. It was adjudged that the defendant was 70% liable to the first plaintiff and 100% liable to the second plaintiff. He also adjudged that the first plaintiff was 30% liable to the second plaintiff based on the counterclaim against the first plaintiff by the defendant. It was further adjudged that the defendant was to pay the first plaintiff 70% of the total judgment sum granted to the first plaintiff and to pay the second plaintiff 70% of the total judgment sum granted to the second plaintiff.

[7] In his grounds of decision, the sessions court judge stated that there were four possible scenarios of the accident and he found the fourth possibility to be probable. From his conclusion, he found both the first plaintiff and the

defendant liable for the collision and apportioned liability 30% against the first plaintiff and 70% against the defendant.

[8] The trial judge stated that 'in this fourth possibility, the defendant might have noticed the motorcycle but nevertheless thought that it was still safe to turn into the junction.' At p 373 of the record of appeal (MYY-12B-2/6 of 2012), he said that the defendant could, in all probability saw the motorcycle but that was when the motorcycle was about 70 to 100 meters from the junction. He stated in this possibility the defendant could have stopped for a while or slowed down but did not do these long enough (to ensure that it was safe before he turned into the junction). He stated that the first plaintiff too had faults and lack prudence. He stated that on the part of the first plaintiff, even though he had the right of way, but the first plaintiff was also not prudent as he did not slow down when his motorcycle was about to reach the junction. He said that the first plaintiff must have known that upon reaching such junction, there would be vehicles waiting to go out to the main road or vehicles about to turn in. He said that 'therefore it would only be prudent that he must try to slow down but looking into the facts of this case and that the damage to the car was at the rear left back door, the first plaintiff must have not slowed down at all.'

[9] In these appeals, the plaintiffs' counsel submitted that the defendant suddenly and abruptly turned into the junction when the first plaintiff was near to the junction, ie about 30 meters away. He submitted that the defendant was driving at about 50–60 km/hour and the speed limit in that area was 50km per hour although there was no evidence on the speed of the car as it approached the junction. Counsel for the defendant submitted that since the first plaintiff first saw the car when it was 30 meters away, with the car's signal light on, he should take the necessary precaution to avoid the collision. It was submitted that the first plaintiff was driving the motorcycle at more than 60km per hour and that his speeding had contributed to the collision. Both counsel agreed that the motorcycle was about 30 meters from the junction when the defendant turned into the junction across the path of the motorcycle.

[10] As stated above, the trail judge had referred to the four possibilities and delved further on the fourth possibility. In his grounds of decision, he did not condescend into particulars or the facts of the case. Instead he stated that 'the defendant might have noticed' or 'might have thought that it was still safe' or 'might have been a matter of a wrong calculation by the defendant and might also have been a matter of a little lack of prudence by the plaintiff'.

[11] From the grounds of decision, he again assumed that 'in this fourth possibility, both parties must have not exercise(d) the rule of prudence to a lot of degree and must have not been careful.' Both counsel had submitted on the

speed of the motorcycle and the car at about the collision but the trial judge did not refer to, did not deal with it and did not come to any finding on the relative speed of the motorcycle and the car, whether it was safe for the defendant to turn into the junction and whether the first plaintiff had slowed down, given the speed of both vehicles. Although the trial judge said that the 'defendant could, in all probability saw the motorcycle but that was when the motorcycle was about 70 to 100 meters from the junction', both counsels had submitted that the motorcycle was about 30 meters from the junction when the defendant saw the motorcycle and turned into the junction.

[12] However, the record of appeal established that the defendant had testified that he did not see the motorcycle driven by the first plaintiff in the opposite direction because the motorcycle's lights were not switched on when the motorcycle driven by the first plaintiff was near to the junction. He said thatwhen he was turning into the junction, he felt that his car was being knocked. He stopped and went out of his car to look what happened and he saw a motorcycle with the rider and pillion rider had fallen on the road (see p 350 of Vol 1 of record of appeal of MYY-12B-2/6 of 2012). Therefore the finding of the trial judge that the defendant could in all probability saw the motorcycle when the motorcycle was about 70 to 100 meters from the junction was against the weight of the evidence in this case.

[13] The first plaintiff had right of way. The evidence established that the first plaintiff could not avoid the collision when the defendant swerved to his right across the road, in the path of the motorcycle driven by the first plaintiff, to enter the junction. Therefore, the trial judge had misdirected himself on the facts of this case. On the evidence as recorded in the record of appeal, the trial judge had erred in coming to this conclusion that both the first plaintiff and the defendant were liable for the collision and had erred in apportioning liability 30% against the first plaintiff and 70% against the defendant.

[14] I find support in my findings in the judgment in *KP Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49 as follows:

> Turning to the instant case the fault of the taxi-driver was said to lie in his failure to reduce speed and keep a proper lookout. To be found wanting in these respects, however, I think there should have been a finding of fact not only as to the speed at which he was going but also interval of time and space affording him opportunity to avoid the consequences of the other driver's recklessness after he should reasonably have anticipated danger. How far did visibility extend when the taxi reached the brow of the hill and both drivers were in sight of each other? How far apart were the two vehicles when the Penghulu gave unmistakable indication, if any, of his intention to cross the path of the taxi? To these questions I have been looking for an answer. It seems to me, therefore, that without these essential primary findings of fact the inference of any want of care cannot be legitimately drawn.

[15] The trial judge had also erred to adjudge that the first plaintiff was 30% liable to the second plaintiff based on the counterclaim against the first plaintiff by the defendant. A pillion rider is entitled to recover the total amount of damages against a tortfeasor and it is within his prerogative to recover the damages against any one of the tortfeasors. The pillion is entitled to the total amount of damages notwithstanding the finding that the rider of the motorcycle and the driver of the car were equally blameworthy. In this case, the second plaintiff was an 'innocent passenger' and was entitled to damages on a 100% basis. He could not, as a pillion rider, be held to be vicariously liable for the contributory negligence of the first plaintiff. The trial judge had erred in apportioning liability on a 30:70 basis between the second plaintiff and the defendant: *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318; [2005] 1 CLJ 695. The appeal by the first and second plaintiffs against liability is allowed.

[16] On the appeal on the quantum, an appellate court will only interfere with the award or quantum of damages by a trial court if it is shown that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damage suffered. Just because the appellate court may have a different view on the amount of damages is not a sufficient reason to interfere with the award of the the trial judge unless the amount is so excessive or insufficient as to be plainly unreasonable: see *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239, *Tan Kuan Yau v Suhindrimani Angasamy* [1985] 2 MLJ 22; [1985] 1 CLJ 429, *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89.

[17] I refer to the assessment of damages awarded to the second plaintiff. There is no reason for this court to interfere with the award given by the trial judge to the second plaintiff in his grounds of decision and judgment.

[18] The trial judge had erred to award the sum of RM326,800 as loss of future income to the first plaintiff as special damages. It has been decided that loss of future earnings and loss of earning capacity fall under general damages and not as special damages: *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30; [1984] 1 CLJ Rep 294.

[19] Section 28A(2)(c)(i) of the Civil Law Act 1956 provides that in awarding damages for loss of future earnings the court shall take into account that in the case of a plaintiff who has not attained the age of 55 years, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earning by his own labour or other gainful activity before he was injured. This provision demands that the plaintiff must fulfill certain prerequisites before he can be successful in his claim for loss of future earnings and failure to fulfill these are

fatal to the plaintiff's claim. Therefore, the plaintiff cannot raise any presumption that he was in good health at the material time but for the injury. He must tender evidence to show his overall health but for the injury and that he was receiving earnings by his own labour before he was injured. There must be evidence to show that but for the injury he was not able to earn in the future: *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608; [2008] 3 CLJ 489.

[20] Future loss of earnings or loss of prospective earnings are awarded for real assessable loss ie, loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation. There must be evidence of a real and substantial loss which must not be remote and speculative: In the absence of such evidence to prove loss of future earnings, if the court is satisfied that the plaintiff has suffered a loss of earnings capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings: *Ngooi Ku Siong & Anor v Aidi Abdullah*.

[21] The first plaintiff had, in his witness statement, testified that prior to the accident on 1 July 2010 he was a very healthy person and active in sports but due to the injuries and disabilities, which he sustained from the accident, he was not able to do all the activities that he wanted to do and he could not return to his previous occupation as a welder. His mother had also testified as such in her witness statement. Both of them were not cross-examined on this and their testimonies must be accepted.

[22] Dr Richard Chen had testified that the first plaintiff's deformity of the left arm is due to the malunion of the fracture of left humerus and that the deformity is a permanent disability. He testified that the first plaintiff was not able to return to his previous occupation and he was not able to resume any sporting activities permanently. Dr Francis Ting testified that the first plaintiff has complete paralysis of the left upper limb as a result of the left bronchial plexus injury and this disability was likely to be permanent. He testified that the first plaintiff will not be able to do any work that needs both upper limbs to be functioning well. He testified that the first plaintiff should be able to do most work that needs the use of only one hand ie his right hand but he will not be able to return to his previous occupation as a welder.

[23] The first plaintiff had testified that he had applied for employment in Miri and in Sabah but was not successful because of his deformity to his left hand. He testified that he is no longer able to work as a welder due to his injuries and not able to earn the same or similar salary. The medical evidence showed that he has severe permanent impairment that would restrict his movement or mobility to the extent that he can neither work nor is forced to seek a job that pays less than what he was earning before the accident. The

appeal record showed that the first plaintiff had established that he had suffered a real substantial loss. For the reasons given, his claims for loss of future earning is allowed.

[24] The trial judge did not refer to s 28(2)(c)(iii) of the Civil Law Act when he assessed the loss of future earnings and he had erred. From the evidence in the record of appeal, his average monthly pay was RM1,870.60. The first plaintiff testified that his monthly living expenses amounted to between RM300 to RM400 at the time he was injured. After diminution of the living expenses at RM400, the court awards him loss of future earnings at RM282,355.20.

[25] I have read the grounds of decision of the trial judge in awarding damages for the injuries sustained by the first plaintiff arising from the accident in this case. There is no reason for this court to disturb the damages awarded to the first plaintiff except for the completed left bronchial plexus injury referred to in his judgment. The trial judge had awarded RM75,000 for this injury. I refer to the submissions of the plaintiff's counsel (at p 93 of his submissions) where he cited several authorities to establish that the accepted damages for this injury should be RM60,000. Therefore, the trial judge had erred in awarding RM75,000 to the first plaintiff for this injury. I amend the award to RM60,000.

[26] Each appeal to the extent as set out above is allowed. Each party to pay their own costs in these appeals.

[27] Interest on special damages at 2%pa from the day of accident and general damages is at 4%pa from the date of service of the summons, and interest from the date of judgment at 5%pa but no interest on future lost of earnings.

Appeal and cross-appeal in part allowed.

Reported by Kanesh Sundrum